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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ALABAMA ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION,
ALABAMA POWER COMPANY and
THE SOUTHERN COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Alabama Electric Cooperative, Inc. (hereinafter called the Cooperative), respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit, which affirmed an order of the Securities and Exchange Commission denying the Cooperative's petition to intervene and denying the Cooperative a hearing in a financing proceeding under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq.

OPINIONS BELOW

The opinion and order of the Securities and Exchange Commission are not yet reported; they are set forth at pages JA 113-124 of the Joint Appendix duplicated for use in the Court of Appeals (R. 113-124).[1] The opinion of the Court of Appeals likewise is not yet reported; it is set forth in Appendix A to this petition (pp. 1a-5a, infra).

JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. §§ 1254(1) and 2101(c), and on Section 24 of the Holding Company Act, 15 U.S.C. § 79x. The Court of Appeals rendered its opinion and judgment November 24, 1965 (R. 129, 135). This petition is being filed within ninety days thereafter.

QUESTIONS PRESENTED

1. Whether, in this Holding Company Act financing proceeding, the Securities and Exchange Commission should have afforded Alabama Electric Cooperative an opportunity to show at a hearing that, under the Holding Company Act's standards, the circumstances, as alleged by the Cooperative, called for SEC to impose reasonable and appropriate conditions on Alabama Power Company's proposed issue and sale of common stock and on The Southern Company's proposed acquisition thereof—such conditions being for the purpose of assuring that Alabama Power Company would not use the proceeds for projects involving wasteful or unnecessary duplication of facilities already installed

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[1] Pursuant to this Court's Rule 21(3) and (4), nine additional copies of the Joint Appendix are being filed in this Court. The record as certified by the Clerk of the Court of Appeals is referred to herein as "R."

by the Cooperative and its member systems, or for measures otherwise detrimental to the public interest or the interest of investors and consumers. Or whether instead (as SEC determined), despite the broad standards established by the Holding Company Act for SEC's responsibilities to protect the public interest and the interest of investors or consumers, such matters are to be considered not by SEC but exclusively by the Alabama Public Service Commission, and this without regard to, and without SEC inquiry into, the adequacy or effectiveness of Alabama's regulatory measures.

2. Whether SEC should have granted the Cooperative's petition to intervene and for a hearing on the issues raised by the Cooperative's petition; and whether SEC's failure to do so contravened either the Holding Company Act or the Administrative Procedure Act or both.

STATEMENT OF THE CASE

This case involves an important question under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 et seq.

On January 22, 1965, there was filed with the Securities and Exchange Commission a joint application-declaration by The Southern Company (which is a registered holding company) and by various of its subsidiaries including Alabama Power Company. Among other things, the joint application-declaration proposed that The Southern Company be authorized to use $14,000,000 for purchasing an additional 140,000 shares of common stock of Alabama Power Company, and that Alabama Power Company be authorized to issue and sell such shares to The Southern Company, such proceeds to be applied by Alabama Power Company

towards Alabama Power Company's 1965 construction program (J.A. 1-16). Within the time fixed by a notice issued by SEC (J.A. 31-33), Alabama Electric Cooperative, Inc. (herein called the Cooperative) filed with SEC a petition requesting that a hearing be held on the issues raised by the joint application-declaration, and to intervene as a party and to participate and be heard in the proceeding (J.A. 34-44).

Its petition filed with SEC showed that the Cooperative is a non-profit electric corporation organized as a cooperative under the laws of Alabama and engaged in generating and transmitting electric energy to various of its members. Those members receiving electric energy from the Cooperative consist of certain distribution cooperatives (which, like the Cooperative itself, are financed by loans from the Rural Electrification Administration), certain Alabama municipalities, and two industrial corporations. The Cooperative's petition included the following (J.A. 40-41):

> "9. It is the Cooperative's position that during recent years Alabama Power Company has been and now is pursuing a course of conduct which involves wasteful, unnecessary and unjustified duplication of lines and facilities already installed by and being used by the Cooperative and its member systems for furnishing electric energy to their customers, and involves an effort by Alabama Power Company to take away from the Cooperative and its member systems valuable customers already receiving adequate electric service; that such duplication of lines and facilities by Alabama Power Company has caused and will cause the idling of electric lines and facilities in which the Cooperative and its member systems have a large investment; that such duplication of lines and facilities by Alabama Power Company will adversely affect the economic condition of the areas concerned; and

> that such duplication by Alabama Power Company is detrimental to the public interest and to the interest of investors and consumers. On these matters the Cooperative stands ready to adduce evidence before this Commission when a hearing is scheduled in this proceeding. In addition, it is the position of the Cooperative that such wasteful, unnecessary and unjustified duplication by Alabama Power Company imposes permanent burdens on the consumer by putting into Alabama Power Company's rate base the additional costs of lines and facilities which are wholly unnecessary and need not be built; and that the ultimate sufferers will be not only the Cooperative and its members, but the consumers and the public at large in the areas served."

The petition shows that the Cooperative requested a hearing at which it would be given an opportunity to show why, in the light of such allegations and under the standards established by the Holding Company Act, the circumstances called for SEC to impose reasonable and appropriate conditions on Alabama Power Company's proposed issuance and sale, and on The Southern Company's proposed acquisition, of Alabama Power Company stock. The purpose of the conditions requested was to assure that none of the proceeds of the financing be used by Alabama Power Company for projects involving wasteful or unnecessary duplication of facilities or for measures otherwise detrimental to the public interest or the interests of investors and consumers.

Specific issues which the Cooperative's petition raised under the Holding Company Act included the following (J.A. 39-40):

> (a) Whether, in the event SEC granted an exemption from Section 6(a) of the Holding Company Act, 15 U.S.C. § 79f(a),—an exemption which the joint application-declaration claimed

by virtue of the provisions of the third sentence of Section 6(b), 15 U.S.C. § 79f(b)—then SEC should at the same time impose conditions "appropriate in the public interest or for the protection of investors or consumers," as also contemplated by Section 6(b).[2]

(b) Whether, in the event that appropriate conditions were not imposed, the acquisitions by Southern would tend towards the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers (within the meaning of Section 10(b)(1) of the Holding Company Act, 15 U.S.C. § 79j(b)(1)).

(c) Whether, in the event that appropriate conditions were not imposed, the acquisitions by Southern would be detrimental to the public interest or the interest of investors or consumers (within the meaning of Section 10(b)(3) of the Holding Company Act, 15 U.S.C. § 79j(b)(3)).

(d) Whether, in the event that appropriate conditions were not imposed, there would be lacking a basis for finding that the acquisitions by Southern would serve the public interest by tending towards the economical and efficient development of an integrated public-utility system (within the meaning of Section 10(c)(2) of the Holding Company Act, 15 U.S.C. § 79j(c)(2)).

(e) Whether appropriate terms and conditions should be imposed, as necessary or appropri-

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[2] The text of Sections 6(a) and 6(b) of the Holding Company Act, and of other pertinent provisions referred to, is set forth in Appendix B (pp. 6a-14a, infra).

ate in the public interest or for the protection of investors or consumers, as contemplated by Section 10(e) of the Holding Company Act, 15 U.S.C. § 79j(e).

The Cooperative's petition also noted that the subject of Alabama Power Company's unnecessary duplication of lines and facilities had been before the Alabama Public Service Commission and the Alabama state courts in connection with requisite state regulatory approvals of Alabama Power Company's financing proceedings in recent years, and that an anti-duplication clause had been inserted in the approvals granted by the Alabama Public Service Commission for the 1963 and 1964 financing proceedings. The petition noted, however, that in the 1965-1966 financing proceeding, which included Alabama Power Company's application for the requisite state regulatory approval of the proposed stock issuance involved before SEC in the present proceeding, the Alabama Public Service Commission had omitted the anti-duplication provision by two-to-one vote, and that such order was then pending on review in the Circuit Court of Montgomery County, Alabama.[3] The petition went on to say that, whatever the scope of the issues which might have been involved in the state proceedings, it seemed clear that SEC had the responsibility for examining whether, in the present proceeding, appropriate conditions should be imposed in the light of the standards set forth in the Holding Company Act (J.A. 37-38, footnote 3).

On June 1, 1965, SEC issued an order permitting the joint application-declaration to become effective; it

[3] The case is still pending in the Circuit Court of Montgomery County, No. 36477, *Alabama Electric Cooperative* v. *Alabama Public Service Commission.*

denied the Cooperative's petition for leave to intervene and denied the Cooperative's request for a hearing (J.A. 123-124). In the accompanying findings and opinion (J.A. 113-123), SEC interpreted the Holding Company Act as excluding from SEC's consideration, under the Holding Company Act, issues such as wasteful and unnecessary duplication of facilities; SEC held that, despite the broad language of the Holding Company Act concerning public interest and the interest of investors or consumers, these are matters to be considered exclusively by the Alabama Public Service Commission. In so holding, SEC did not make any determination—or indeed, any inquiry—as to the adequacy or effectiveness of the Alabama state regulatory measures. Instead, SEC said that "The Cooperative has misconceived our authority under the Act" (J.A. 116). Apparently the SEC decided that under the Act its jurisdiction was strictly limited "to the type, amount, price and other terms of the securities" (J.A. 116), and that it was totally foreclosed from considering broader issues relating to the public interest and the interest of investors or consumers.

The Cooperative filed a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit. On November 24, 1965, the Court of Appeals affirmed (R. 129-135). It thought that there is a "fallacy" in equating the Holding Company Act's term "public interest" with the same term "as it is used in licensing or certification statutes" (pp. 3a-4a, infra). Accordingly, it held that the Holding Company Act "has the restricted meaning attributed to it by the SEC" (p. 5a, infra) and that "the SEC acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it" (p. 5a, infra).

STATUTORY PROVISIONS INVOLVED

The statutory provisions which are involved, being lengthy, are set forth in Appendix B (pp. 6a-15a, infra). They are Sections 1, 6 and 10 of the Holding Company Act, and Section 10(e) of the Administrative Procedure Act.

REASONS FOR GRANTING THE WRIT

Although the question involved in this case is a question of first impression,[4] it is of substantial importance to the fair and effective administration of the Holding Company Act and it warrants review by this Court.

1. The SEC and the Court of Appeals have failed to adhere to the plain intent of a number of decisions of this Court—decisions wherein this Court has broadly interpreted terms such as "public interest" and "public convenience and necessity" in a wide variety of federal regulatory legislation. See, for example, *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U.S. 378, 391; *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216-224; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 79-88; *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Amer-*

[4] A comparable question now is awaiting oral argument (scheduled for March 28, 1966) in the United States Court of Appeals for the Fifth Circuit in No. 22858, *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange Commission.* That case involves a subsequent financing application which Alabama Power Company filed with SEC; the Cooperative again sought to intervene on comparable grounds; on July 29, 1965, the SEC issued an order (Holding Company Act Release No. 15287) denying intervention and denying a hearing, essentially on the authority of its prior decision in the present case; and the Cooperative filed a petition for review in the Fifth Circuit.

ican Airlines v. *North American Airlines,* 351 U.S. 79, 82-86; *F.P.C.* v. *Transcontinental Gas Corp.,* 365 U.S. 1, 7-8; cf. *United Gas Co.* v. *Callery Properties,* 382 U.S. 223, 226. As this Court emphasized in two of the opinions just cited (360 U.S. at 391, and 365 U.S. at 8) —both of which happened to involve Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e)—such a statute "requires the Commission to evaluate *all* factors bearing on the public interest".

Here, however, the Court of Appeals (pp. 3a-4a, infra) has rejected the applicability of this whole line of cases on the ground that there is a "fallacy" in equating the Holding Company Act's term "public interest" with the same term "as it is used in licensing or certification statutes". On this ground the Court of Appeals justified the SEC's refusing even to consider whether Alabama Power Company's proposed use of the financing proceeds for wasteful and unnecessary duplication of existing facilities of REA-financed cooperatives would adversely affect what the Holding Company Act repeatedly refers to as "the public interest", "the protection of investors or consumers", and "the interest of investors or consumers".[5]

It is true that the cases previously adjudicated by this Court have, primarily, involved licensing or certification proceedings. But nothing will be found in the opinions to suggest that this Court intended any

[5] Among other places where they appear, the terms "public interest" and "the interest of investors or consumers" (or, alternatively to the latter, "the protection of investors or consumers") are the key terms in Section 1 (Findings and Declaration of Policy) as well as in Section 6(b) and in Section 10. These sections, which are the provisions of the Act directly involved in this case, are set forth in Appendix B (pp. 6a-14a, infra).

such restrictive interpretation to be imposed on the principles it enunciated. The whole thrust of this Court's rulings is in the direction of assuring that federal regulatory agencies, before making up their minds, will carefully consider all factors bearing on the public interest. Just as the "end use" to be made of the natural gas was held properly within the scope of the Power Commission's inquiry in *F.P.C.* v. *Transcontinental Gas Corp.*, supra, 365 U.S. at 8-22, so here the end use to be made of these financing proceeds is something which SEC cannot properly refuse even to consider.

Here the SEC and the Court of Appeals have drastically narrowed the scope of the inquiry. In doing this, they have seriously departed from the guidelines which this Court has so carefully established.

2. The Court of Appeals (p. 4a, infra) purported to find some support for its result in the legislative history of the Holding Company Act. The support was wholly misplaced. At most it shows what is undeniable —that in enacting the great reform measure known as the Public Utility Holding Company Act of 1935, the Congress intended and expected the Act to bring about reforms which would enable state regulatory processes to be strengthened. Nothing in the legislative history justifies jumping from that obvious truth to the unwarranted conclusion that "public interest" or "the protection of investors or consumers" were intended to be restricted so as to exclude totally from SEC's consideration a broad range of factors merely because they were factors which the state commissions were likely to consider. Indeed, Congress plainly did not direct or authorize that the SEC delegate entirely to state commissions the responsibilities lodged in SEC for

seeing that the additional federal protections, imposed by Holding Company Act standards, are assured to the public interest and to the interest of investors and consumers.

We recognize that not every misreading of legislative history is something which this Court feels called upon to correct. But here the misreading goes to a fundamental matter, and the occasion for review by this Court is particularly timely since it is evident that the Court will be extensively reviewing the legislative history of the Holding Company Act in No. 636, *Securities and Exchange Commission* v. *New England Electric System,* certiorari granted, 382 U.S. 953, which is expected to be argued later this term. This will make it especially timely and appropriate for the Court also to consider the impact of the Act's legislative history on the question presented here.

3. The decision below is not only erroneous, but is seriously detrimental to effective federal regulation of public utility activities which Congress clearly placed within the ambit of federal regulation. What SEC has done, in substance, is to abdicate totally to the state public service commissions an important segment of the responsibility which the Congress vested in SEC; and it has done this without even making inquiry into the adequacy or the effectiveness of the Alabama state regulatory process. But Congress never intended to leave wholly to the whim of the state commissions whether the public interest would be protected at all.

It is well known that there still remains a serious gap between the reality of electric utility regulation throughout the country and the goal of effective regu-

lation.[6] At least as long as such a serious gap persists, it will continue to be important for SEC to fulfill its responsibility for enforcing those minimal federal standards of public interest that the Holding Company Act imposes. Congress intended these substantial federal protections to remain available and effective, under the auspices of the federal SEC, no matter what the gaps and the weaknesses of state law and of state regulatory processes might turn out to be.

4. We emphasize that this case does not present a situation where SEC accorded a hearing to the Cooperative and considered on the merits all the factors which the Cooperative sought to adduce, and then reached a conclusion that, on the merits, "the public interest" and "the protection of investors or consum-

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[6] See, for example, the following excerpts from an address by Joseph C. Swidler, Chairman, Federal Power Commission, "A Program for State-Federal Cooperation in Electric Utility Regulation", before the National Association of Railroad and Utilities Commissioners Convention, New York, New York, October 2, 1965, pp. 14-16:

> "As we all know, state legislatures have not been uniformly willing to grant broad jurisdiction. Surveys made by this Association show that three of our states have not yet empowered a state-wide commission to regulate electric rates (Texas, Minnesota, South Dakota). Other states have failed to authorize regulation of wholesale rates, or have otherwise restricted the scope of regulation. Even more important, however, is the fact that in many states which have model laws the legislatures have withheld the practical resources for their effective administration. . . .
>
> "What is clear from these statistics and confirmed by our own knowledge is that there is a serious gap between the reality of electric utility regulation throughout the country and the goal which we in NARUC share, a goal of effective regulation, fairly administered by strong and independent commissions."

ers" did not require that SEC impose conditions of the type which the Cooperative requested. This is the very opposite of what occurred. What the Cooperative is challenging is not an assessment which SEC actually made of all the competing factors—for this is something SEC never did—but rather SEC's interpretation of the Act as barring SEC from taking into account at all the factors which the Cooperative put forward as bearing on the public interest and the protection of investors or consumers.

Such a narrowing of the basic concept simply cannot be squared with the Act. Surely it cannot be totally irrelevant to the national public interest, which the Holding Company Act directs SEC to protect, that a financing plan proposed by the subsidiary of a large interstate registered holding company is to be used to accomplish wasteful, unnecessary and unjustified duplication of existing facilities. This is particularly the case if such duplication is aimed at crippling or impeding the operations of existing REA-financed cooperatives which are carrying out important federal programs Congress has authorized in the Rural Electrification Act, 7 U.S.C. §§ 901 et seq., and in subsequent annual appropriation laws. And equally, it cannot be totally irrelevant to the national public interest, and to the interest and protection of consumers, that the proceeds of such a financing plan are to be used to construct wasteful, unnecessary and unjustified duplicating facilities which will become a permanent component to enlarge Alabama Power Company's rate base and hence militate against rate reductions by Alabama Power Company, and which will wastefully idle cooperatives' ex-

isting facilities and hence militate against rate reductions by cooperatives.

Nothing in the legislative history warrants reading the Act in so destructively narrow a manner as to justify totally excluding such factors from SEC's consideration. Certainly the text of the Act itself provides no basis for doing so.

CONCLUSION

On the important matter raised by this case, the SEC has espoused a self-denying and highly restrictive interpretation of the Holding Company Act. This restrictive interpretation has been affirmed by the Court of Appeals on grounds which, like the SEC's, depart from the plain intent of numerous decisions of this Court placing a much broader interpretation on terms such as "public interest" used in a wide variety of federal regulatory legislation. By unduly curtailing SEC's jurisdiction, the decision upsets the allocation of responsibilities which Congress contemplated as between the federal government and the states. And the Court of Appeals has reached its result by an erroneous reading of the Holding Company Act's legislative history—a legislative history which this Court will shortly be examining in connection with No. 636, *Securities and Exchange Commission v. New England Electric System,* now awaiting oral argument.

For the reasons which have been stated, the petition for certiorari should be granted.

Respectfully submitted,

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February 1966

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,403

ALABAMA ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*
ALABAMA POWER COMPANY AND THE SOUTHERN COMPANY, *Intervenors*

Petition to Review an Order of
The Securities and Exchange Commission

Decided November 24, 1965

Mr. Bennett Boskey, with whom *Mr. Joseph Volpe, Jr.,* was on the brief, for petitioner.

Mr. Ellwood L. Englander, Assistant General Counsel, Securities and Exchange Commission, with whom *Messrs. Philip A. Loomis, Jr.,* General Counsel, and *David Ferber,* Solicitor, Securities and Exchange Commission, were on the brief, for respondent. *Mr. Robert W. Cox,* Attorney, Securities and Exchange Commission, also entered an appearance for respondent.

Mr. John Bingham, of the bar of the Supreme Court of Alabama, *pro hac vice,* by special leave of court, with whom *Mr. Ezekiel G. Stoddard* was on the brief, for intervenors.

Before: EDGERTON and WILBUR K. MILLER, *Senior Circuit Judges,* and MCGOWAN, *Circuit Judge.*

WILBUR K. MILLER, *Senior Circuit Judge*: On January 21, 1965, The Southern Company, a registered holding company,[1] and certain of its public utility subsidiaries

[1] Under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 *et seq.*, 49 STAT. 838.

including Alabama Power Company, filed with the Securities and Exchange Commission a joint application-declaration seeking authorization for the issue by Alabama Power and the purchase by Southern of 140,000 shares of common stock for $14,000,000, the proceeds to be used by Alabama Power in its 1965-1966 construction program. Exemption from the provisions of Section 6(a) of the Public Utility Holding Company Act[2] was claimed under that portion of Section 6(b) which is reproduced in the margin.[3]

Alabama Electric Cooperative, Inc., which provides electric energy to certain municipalities and local cooperatives in the general area in which Alabama Power operates, petitioned for leave to intervene. It alleged that Alabama Power intended to use a part of the proceeds of the stock sale for construction of lines and other facilities which would duplicate its own, and asked that the Commission condition its authorization so to as prevent such use of any part of the proceeds of the stock sale. Alabama Electric also requested a hearing.

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[2] Section 6(a), 15 U.S.C. § 79f(a), is in pertinent part as follows:

> "Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company . . . ."

[3] ". . . The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business . . . ."

On June 1, 1965, the SEC denied Alabama Electric's petition for intervention and for a hearing, and authorized the issuance and sale of stock as proposed by Southern and Alabama Power. It pointed out that such issue and sale are solely for the purpose of financing the business of Alabama Power and have been expressly authorized by the Public Service Commission of Alabama,[4] the state in which Alabama Power is organized and doing business; thus, exemption under Section 6(b) of the Act was granted. The SEC held the Cooperative's intervention and a hearing would not be in the public interest.

The Cooperative petitions for review. It says SEC erred in refusing to consider conditioning its authorization of the stock sale by providing that no part of the proceeds thereof should be used to duplicate Alabama Electric's facilities. This was within the power of the Commission, it contends, because Section 6(b) of the Act directs the SEC to grant exemption in some circumstances, "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consummers . . . ." In making this argument, the Cooperative

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[4] As Alabama Power Company is incorporated in and operates only in Alabama, the proposed financing was first submitted to the Alabama Public Service Commission, which conducted an evidentiary hearing. Alabama Electric, permitted to intervene, participated in the hearing, introduced evidence, and made the same arguments it advances here.

The State Commission found that the proposed financing (which included the stock issue involved here) "Is for lawful objects within the corporate purposes of petitioner [Alabama Power], viz: . . . acquiring or constructing plants, properties, permanent improvements, extensions and additions to petitioner's property to be used in its public utility business . . . ." It further found the financing to be "compatible with the public interest," as well as "necessary, appropriate for and consistent with the proper preformance . . . of [petitioner's] service to the public . . . ." Accordingly, the proposed financing was approved, without the restriction on the use of the proceeds requested by Alabama Electric.

necessarily equates the statutory term "public interest" with that term as it is used in licensing or certification statutes. Therein lies the fallacy of its contention.

As the Commission said, "Words like 'public interest' and the interest of 'investors or consumers,' though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act." Sections 6 and 7 deal with the issuance of securities by a registered holding company or its subsidiary and the SEC's jurisdiction thereunder is to control such issuance and regulate the terms and conditions of those securities which are approved. The Cooperative would have it that the SEC's jurisdiction extends further: that it may, and should, forbid construction of some of the new facilities which the Alabama Commission has authorized, thus superseding the state agency in its normal regulation of public utility operations.

The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation—not to supplant it. Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions.

Section 10 of the Act, 15 U.S.C. § 79j, which has to do with the approval of the acquisition of securities, is helpful in the consideration of Section 6(b). Subsection (e) is as follows:

> "(e) The Commission, in any order approving the acquisition of securities or utility assets, may preclude such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find

necessary or appropriate in the public interest or for the protection of investors or consumers."

This section serves to confirm our conviction that the language of Section 6(b) upon which petitioner relies, has the restricted meaning attributed to it by the SEC.

The Cooperative's appeal from the Alabama Commission's order, which is now pending, does not prevent the SEC from relying upon the State Commission's approval in granting exemption. The Act directs the SEC to proceed when the state commission has approved. We note, however, that the SEC's Rule 24(c)(2) provides that, where a proposed transaction is to be carried out pursuant to the express authorization of a state commission, the SEC's authorization granted pursuant thereto is automatically "revoked and terminated" if the state commission's action is subsequently "modified, revoked or otherwise terminated." This rule affords adequate protection to the successful appellant from the state commission's order.

We hold that the SEC acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it.

Affirmed.

APPENDIX B

Statutory Provisions

Section 1. Holding Company Act (15 U.S.C. § 79a)

§ 79a. *Necessity for control of holding companies*

(a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H.J.Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an over capitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management

and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter. Aug. 26, 1935, c. 687, Title I, § 1, 49 Stat. 803.

Sections 6(a) and 6(b). Holding Company Act (15 U.S.C. § 79f(a) and § 79f(b)).

§ 79f. *Unlawful transactions by registered companies—Issuing, selling, or altering rights of stockholders to declaration.*

(a) Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or

subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

Exemptions from operation of subsection (a)

(b) The provisions of subsection (a) of this section shall not apply to the issue, renewal, or guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been ex-

pressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) of this section shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on Janary 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) of this section by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 79g of this title as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Section 10. Holding Company Act (15 U.S.C. § 79j).

§ 79j. *Approval of acquisition of securities and utility assets and other interests—Contents of Application*

(a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interests in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the

protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting-trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof or its relations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may be required under section 79e of this title from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions affecting approval

(b) If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-

utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Conditions barring approval

(c) Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 79h of this title or is detrimental to the carrying out of the provisions of section 79k of this title; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commis-

sion finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

Approval to be granted in reasonable time

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

Terms and conditions of order granting approval

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

Compliance with State laws as condition of approval

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 79k of this title. Aug. 26, 1935, c. 687, Title I, § 10, 49 Stat. 818.

Section 10(e). Administrative Procedure Act (5 U.S.C. § 1009(e)).

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1027

ALABAMA ELECTRIC COOPERATIVE, INC., PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION, ALABAMA POWER COMPANY, AND THE SOUTHERN COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–5a) is reported at 353 F. 2d 905. The opinion of the Securities and Exchange Commission is not yet reported. It appears at page 113–124 of the Joint Appendix prepared for the use of the court of appeals.[1]

[1] References to the record as contained in Joint Appendix are cited as "JA".

JURISDICTION

The judgment of the court of appeals was entered on November 24, 1965. The petition for a writ of certiorari was filed on February 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 79x.

STATUTE INVOLVED

The relevant sections of the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U.S.C. 79a *et seq.*, are set forth as Appendix B to the petition except Section 7 of the Act, which is set forth in the Appendix hereto, *infra*, pp. 12–16.

QUESTION PRESENTED

Whether the Securities and Exchange Commission, in exercising its authority to approve sales and acquisitions of securities by registered holding companies and their subsidiaries under the Public Utility Holding Company Act of 1935, is required to consider the imposition of conditions prohibiting the construction of allegedly duplicative local electric service facilities that have been approved by the appropriate State authority.

STATEMENT

The Southern Company ("Southern") is a public utility holding company registered as such with the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. It owns all of the common stock of Alabama Power Company ("Alabama Power"), an Alabama corpo-

ration which owns and operates facilities for the generation, transmission and distribution of electricity within that State. Alabama Electric Cooperative, Inc. ("the Cooperative"), petitioner herein, is an electric cooperative which, in some geographical areas, is in competition with Alabama Power (JA 109).

On October 28, 1964, Alabama Power petitioned the Alabama Public Service Commission ("Alabama Commission") for authority to issue additional common stock and other securities to obtain funds to finance construction of generating plants and related facilities, to permit enlargement of its existing plant facilities, transmission and distribution lines and for other purposes (JA 17–24). The Cooperative was permitted to intervene and to participate fully in that proceeding, where it presented its views that unqualified approval by the Alabama Commission would result in the use of some of the funds for construction of facilities duplicating certain facilities of the Cooperative to the detriment of the Cooperative and the public.[2] It asked that approval either be denied or conditioned so that the funds obtained would not be used to duplicate the Cooperative's existing facilities (JA 111–112). Notwithstanding the Cooperative's presentation, on November 25, 1964, the Alabama Commission issued an order approving the transactions without the requested qualification, finding that the proposed transactions were "com-

[2] The Cooperative had intervened for like reasons in connection with prior financing applications made by Alabama Power (JA 38–39, n. 3).

patible with the public interest" and were "necessary, appropriate for and consistent with the proper performance by [Alabama Power] of its service to the public * * * and [would] not impair its ability to perform that service; and [were] reasonably necessary and appropriate for such purposes" (JA 27).[3]

On January 22, 1965, Southern, Alabama Power and other operating subsidiaries of Southern, filed a joint application with the Securities and Exchange Commission under the Public Utility Holding Company Act ("the Act") seeking, *inter alia,* an order of exemption under Section 6(b) for the issuance and sale of 140,000 shares of common stock by Alabama Power to Southern for the purposes approved and authorized by the Alabama Commission, and approval under Section 10 of the acquisition of such shares by Southern (JA 1–16). The application stated that, since Alabama Power's common stock was to be issued solely for the purpose of financing its business and since the sale had been expressly approved by the Alabama Commission, Alabama Power was entitled to the exemption provided by Section 6(b) of the Act from the requirements of Section 7 of the Act (JA 8). The application also set forth facts indicating that Southern had complied with the provisions of the Act applicable to securities acqui-

[3] One member of the Alabama Commission dissented in part from the order on the specific ground that a condition precluding duplication of existing facilities was not being imposed (JA 29–30). The Cooperative has appealed the order to the courts of Alabama (JA 38–39, n. 3).

sitions, *i.e.*, Sections 9(a), 10, and 12(f) (see JA 8).

On February 4, 1965, the Securities and Exchange Commission, pursuant to its Rule 23,[4] gave public notice of the proposed transactions, indicating that the application might be granted in due course unless the Commission, on application of any interested person, should find that a hearing was appropriate (JA 31–33).

On March 1, 1965, the Cooperative petitioned to intervene before the Securities and Exchange Commission and asked that a hearing be held (JA 35–44). The petition set forth substantially the same matters as the Cooperative had presented to the Alabama Commission. It complained that a portion of the proceeds of the financing would be employed to duplicate certain of the Cooperative's lines and facilities (JA 38, 41–42). It asked the Securities and Exchange Commission, as it had previously and unsuccessfully asked the Alabama Commission, to provide such limitations on the use of the proceeds as would preclude duplication of facilities (JA 42). It asserted that this could be accomplished by the Securities and Exchange Commission exercising its discretion pursuant to Section 6(b), 7 or 10 of the Act to impose terms and conditions upon the financing (JA 40–41).

On June 1, 1965, the Securities and Exchange Commission issued the order under review (JA 123–124),[5]

[4] 17 C.F.R. 250.23.

[5] The proposed financing by Southern and its other subsidiaries, not questioned by the Cooperative, had been approved

holding that the Act did not contemplate that the Commission "may determine, either directly or through the imposition of conditions, whether one or another public-utility company is the better qualified to provide electric service in a particular local community, or whether local consumers should or should not be provided a competitive choice of services" (JA 117). Such questions, the Commission held, were "to be determined by the appropriate licensing or franchise authorities, in this case the Alabama Commission, from which Alabama Power holds a certificate of convenience and necessity and which has disagreed with the very arguments that the Cooperative's petition presents in the proceeding before us" (*ibid.*). Accordingly, the joint application was granted and the Cooperative's petition for leave to intervene was denied (JA 122–124). The Court of Appeals for the District of Columbia Circuit unanimously affirmed the Commission's order (Pet. 1a–5a).

ARGUMENT

The decision of the court of appeals affirming the order of the Securities and Exchange Commission is clearly correct, and it is not in conflict with any decision of this or any other Court.

1. Under Section 6(b) of the Act the Commission may authorize certain securities transactions "subject

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by Commission order of March 11, 1965 (R. 141–144). That order had reserved jurisdiction with respect to the matters raised by the Cooperative's petition.

to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers." Petitioner contends (Pet. 10) that this requires the Commission to consider and evaluate all factors bearing on the public interest including the public advantage or harm resulting from the use of the proceeds of such transactions to construct duplicative facilities though such construction has been approved by the appropriate State regulatory agency. Both the Commission and the court of appeals held that, in the context of the Public Utility Holding Company Act, the words "public interest" have a narrower significance. They both observed (JA 116; Pet. 4a) that "Words like 'public interest' and the interest of 'investors or consumers,' though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act."

The scope and significance of the words "public interest" appearing in Section 6(b) and elsewhere in the Act are properly understood in terms of the abuses attending the use of the holding-company device in the public-utility field which the Act was intended to remedy.[6] Such abuses, which are de-

[6] Even authorities cited by petitioner show that terms such as "public interest" are not to be interpreted as establishing a standard of administrative jurisdiction so indefinite as to confer unlimited power but are to be given a more restricted meaning appropriate to the statutory context in which they appear. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216. See *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82 (Pet. 9).

scribed in Section 1(b), include improper intercompany transactions and affiliations, unsound financial structures, fictitious asset values, lack of uniform standard accounts and the absence of arms-length bargaining between holding company and subsidiary. The Act authorizes the Commission to protect the public interest by the elimination of these and other evils enumerated in that section.

Wholly irrelevant here are concepts of the public interest derived from statutes which, unlike the Act, confer on other agencies powers traditional to public utility regulation such as fixing reasonable and nondiscriminatory rates, determining the level of service and the persons entitled thereto, and granting or withholding franchises or certificates of public convenience and necessity. The Commission quite properly pointed out that (JA 116–117):

> * * * The provisions in Sections 6 and 7 are concerned with securities to be issued by a registered holding company or any subsidiary thereof. Our jurisdiction thereunder extends to the type, amount, price and other terms of the securities which such company proposes to issue for the purpose of financing the business in which it is lawfully engaged. * * * But neither these nor any other sections of the Act contemplate that we may determine, either directly or through the imposition of conditions, whether one or another public-utility company is the better qualified to provide electric service in a particular local community, or whether local consumers should or should not be provided a competitive choice of services. * * *

It seems apparent that the words on which petitioner relies, considered in the context of the Public Utility Holding Company Act, simply will not bear the expansive and radically new meaning which petitioner would attach to them.[7]

2. Although broad federal control over holding company systems is provided by the Holding Company Act, it is not, as suggested by petitioner, a comprehensive scheme of utility regulation. The purpose of the Act is to deal with problems and abuses which attend the existence of the interstate holding company device in the public utility field and, in so doing, to eliminate and prevent conditions which "make difficult, if not impossible, effective State regulation of public-utility companies." Section 1(a). Conspicuous by its absence from the regulatory scheme is any grant of authority to the Commission which would supplant traditional public utility regulation by the States. The statute itself affirmatively indicates a national public interest in unimpaired State regulation of utility operating functions,[8] and the legislative history of the Act is replete with statements indicating that effective State control of local matters was to be enhanced rather than restricted by the statute

[7] *Securities and Exchange Commission* v. *New England Electric System*, certiorari granted, 382 U.S. 953 (No. 636), to be argued this Term, does not involve the determination of the phrase "public interest" and the issues involved herein are in no way related to any question which this Court will be required to pass upon in that case.

[8] See Sections 1(a), 1(b)(1), 1(b)(2), 1(b)(3) and 1(b)(5). Cf. Sections 6(b), 7(g), 8, 9(b), 10(f) and 21. Compare Section 3(a).

and that no usurpation of traditional State utility regulation was to occur.[9] It is significant in this regard that to enforce this Act the Congress did not choose an agency such as the Federal Power Commission, expressly created to regulate utility operating functions, but chose instead the Securities and Exchange Commission, whose specialized experience was largely in the financial field. It is further significant that the agency so selected, in some thirty years of administration of the Act, has not found it necessary to assert the kind of utility-regulation jurisdiction which petitioner now suggests is an essential ingredient of the statutory scheme. See *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351–352.

The authority of a federal agency to extend its power into areas of traditional State regulation may not be found by inference, as petitioner's contentions would require, but only from a clear congressional expression of such purpose. See, *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 152; *Yonkers* v. *United States*, 320 U.S. 685, 691; *Palmer* v. *Massachusetts*, 308 U.S. 79. Neither the provisions of the Holding Company Act nor its legislative history reflect an expression of such purpose; indeed, from the foregoing it is manifest that congressional expressions are uniformly to the contrary.

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[9] See, *e.g.*, Report of National Power Policy Committee, H. Doc. No. 137, 74th Cong., 1st Sess., p. 3 (President's Message) (1935); *id.* at pp. 7–8; Report of the Committee on Interstate Commerce, S. Rep. No. 621, 74th Cong., 1st Sess., p. 4 (1935).

CONCLUSION

The decision below is clearly correct. There is no conflict or need for further review. The petition for certiorari should be denied.

Respectfully submitted.

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MARCH 1966.

APPENDIX

Section 7 of the Public Utility Holding Company Act of 1935, 49 Stat. 815, 15 U.S.C. 79g, reads as follows:

DECLARATIONS BY REGISTERED HOLDING AND SUBSIDIARY COMPANIES IN RESPECT OF SECURITY TRANSACTIONS

SEC. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 7 of the Securities Act of 1933, as amended, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission shall fix by rules and regulations or order, unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission shall enter an order either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe.

(c) The Commission shall not permit a declaration regarding the issue or sale of a security to become effective unless it finds that—

(1) such security is (A) a common stock having a par value and being without preference as to dividends or distribution over, and having at least equal voting rights with, any outstanding security of the declarant; (B) a bond (i) secured by a first lien on physical property of the declarant, or (ii) secured by an obligation of a subsidiary company of the declarant secured by a first lien on physical property of such subsidiary company, or (iii) secured by any other assets of the type and character which the Commission by rules and regulations or order may prescribe as appropriate in the public interest or for the protection of investors; (C) a guaranty of, or assumption of liability on, a security of another company; or (D) a receiver's or trustee's certificate duly au-

thorized by the appropriate court or courts; or

(2) such security is to be issued or sold solely (A) for the purpose of refunding, extending, exchanging, or discharging an outstanding security of the declarant and/or a predecessor company thereof or for the purpose of effecting a merger, consolidation, or other reorganization; (B) for the purpose of financing the business of the declarant as a public-utility company; (C) for the purpose of financing the business of the declarant, when the declarant is neither a holding company nor a public-utility company; and/or (D) for necessary and urgent corporate purposes of the declarant where the requirements of the provisions of paragraph (1) would impose an unreasonable financial burden upon the declarant and are not necessary or appropriate in the public interest or for the protection of investors or consumers; or

(3) such security is one the issuance of which was authorized by the company prior to January 1, 1935, and which the Commission by rules and regulations or order authorizes as necessary or appropriate in the public interest or for the protection of investors or consumers.

(d) If the requirements of subsections (c) and (g) are satisfied, the Commission shall permit a declaration regarding the issue or sale of a security to become effective unless the Commission finds that—

(1) the security is not reasonably adapted to the security structure of the declarant and other companies in the same holding-company system;

(2) the security is not reasonably adapted to the earning power of the declarant;

(3) financing by the issue and sale of the particular security is not necessary or appropriate to the economical and efficient operation of a business in which the applicant lawfully is engaged or has an interest;

(4) the fees, commissions, or other remuneration, to whomsoever paid, directly or indirectly, in connection with the issue, sale, or distribution of the security are not reasonable;

(5) in the case of a security that is a guaranty of, or assumption of liability on, a security of another company, the circumstances are such as to constitute the making of such guaranty or the assumption of such liability an improper risk for the declarant; or

(6) the terms and conditions of the issue or sale of the security are detrimental to the public interest or the interest of investors or consumers.

(e) If the requirements of subsection (g) are satisfied, the Commission shall permit a declaration to become effective regarding the exercise of a privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security unless the Commission finds that such exercise of such privilege or right will result in an unfair or inequitable distribution of voting power among holders of the securities of the declarant or is otherwise detrimental to the public interest or the interest of investors or consumers.

(f) Any order permitting a declaration to become effective may contain such terms and conditions as the Commission finds necessary to assure compliance with the conditions specified in this section.

(g) If a State commission or State securities commission, having jurisdiction over any

of the acts enumerated in subsection (a) of section 6, shall inform the Commission, upon request by the Commission for an opinion or otherwise, that State laws applicable to the act in question have not been complied with, the Commission shall not permit a declaration regarding the act in question to become effective until and unless the Commission is satisfied that such compliance has been effected.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ALABAMA ELECTRIC COOPERATIVE, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
ALABAMA POWER COMPANY and
THE SOUTHERN COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS ALABAMA POWER COMPANY AND THE SOUTHERN COMPANY IN OPPOSITION

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Opinions Below

The opinion and order of the SEC are not yet reported. They are set forth at pages J.A. 113-124 of the Joint Appendix which has been filed in this Court. The opinion of the Court of Appeals is reported at 353 F. 2d 905. It is also set forth in Appendix A to the Petition herein.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

In a proceeding under the Public Utility Holding Company Act of 1935 to obtain an order of the Securities and Exchange Commission with respect to the issuance and sale of securities by an electric utility and the acquisition of such securities by its parent, a registered public utility holding company, is the SEC required, at the request of another electric corporation of the same State, to examine the use of the proceeds from such sale, already authorized after hearing by the State Commission having jurisdiction, with a view to preventing the application of any portion thereof to expenditures which such other electric corporation objected to before the State Commission, and still objects to, as duplicating some of its facilities in the same State?

Statutes Involved

The statutory provisions relied on by petitioner are Sections 1, 6 and 10 of the Public Utility Holding Company Act and Section 10(e) of the Administrative Procedure Act. They are set forth in Appendix B to the Petition.

Statement of the Case

On January 21, 1965 The Southern Company (herein "Southern"), a registered public utility holding company, and certain of its public utility subsidiary companies, including Alabama Power Company (herein "Alabama Power"), filed with the Securities and Exchange Commission (herein "SEC") a joint application-declaration seeking authorization, among other things, for the issue by Alabama Power and the purchase by Southern of 140,000 shares of common stock for $14,000,000, the pro-

ceeds to be used by Alabama Power in its 1965-1966 Construction Program. Exemption from the registration provisions of Section 6(a) of the Public Utility Holding Company Act was claimed pursuant to the third sentence of Section 6(b) thereof on the ground that the proceeds were to be used solely for the purpose of financing the business of Alabama Power and that the issue and sale had been expressly authorized by the Alabama Public Service Commission (herein "State Commission") (J.A. 1-16).

Alabama Electric Cooperative, Inc. (herein "Cooperative"), petitioner herein, sought leave to intervene in the proceeding before the SEC. It alleged that Alabama Power intended to use a portion of the proceeds of the sale of stock to construct lines and facilities that would duplicate those owned by it. The Cooperative requested the SEC to include provisions in its order authorizing the application-declaration which would prevent such a use of the proceeds, and to devise procedures whereby Alabama Power would be required to notify the SEC in advance of each future expenditure, allowing the Cooperative the opportunity to object thereto and be heard thereon (J.A. 34-44).

The same contentions had previously been made by the Cooperative in a proceeding initiated by Alabama Power before the State Commission seeking its approval of the proposed financing. The Cooperative had been permitted to intervene as an adversary party in that proceeding and had participated in evidentiary hearings before the State Commission (J.A. 107-112). Taken in a light most favorable to the Cooperative, the testimony revealed that out of total proceeds from the proposed financing amounting to

approximately $119 million, less than $2 million was proposed to be spent over a two-year period to provide electric service to the cities of Troy and Luverne, Alabama, municipal systems which had chosen to be served by Alabama Power although theretofore served by the Cooperative* (J.A. 69, 77). The Cooperative requested that the State Commission withhold its authorization of the proposed financing or, in the alternative, that it enter an order directing that no portion of the proceeds thereof or any other funds belonging to Alabama Power be used to duplicate its lines or facilities (J.A. 111).

The State Commission rejected the Cooperative's contention, finding that the proposed financing "Is for lawful objects within the corporate purposes of petitioner [Alabama Power] * * * Is compatible with the public interest [and] Is necessary, appropriate for and consistent with the proper performance by the petitioner of its service to the public * * * and will not impair its ability to perform that service * * *" (J.A. 26-7). The Cooperative has also appealed to the Alabama Courts from the foregoing order of the State Commission.

On June 1, 1965 the SEC denied the Cooperative's petition for intervention and for a hearing in the present proceeding and authorized the issue and sale of stock as proposed by Southern and Alabama Power. The SEC based its order on an express finding that the matters complained of were within the exclusive jurisdiction of the

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* Alabama Power's contracts for the supplying of electric energy to these two cities had previously been unsuccessfully challenged by the Cooperative in separate proceedings before the State Commission. The approval of these contracts by the State Commission has been upheld by the Circuit Court for Montgomery County and is currently being challenged by the Cooperative in the Alabama Supreme Court.

State Commission and that the relief requested by the Cooperative was beyond the SEC's authority under the Holding Company Act (J.A. 113-124).

The Cooperative sought review of the SEC's order in the United States Court of Appeals for the District of Columbia Circuit. Alabama Power and Southern were permitted to intervene in that proceeding in support of the position taken by the SEC. On November 24, 1965 that Court affirmed the order of the SEC, finding that the Cooperative had misconceived the purpose of the Holding Company Act and holding that the SEC "* * * acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it."*

Argument

A careful reading of the Petition herein fails to disclose any substantial ground for the issuance of a writ of certiorari in this proceeding. There is no conflict between the decision being appealed from and a decision of this or any other court. Nor is the issue raised an important question of federal law which has not been, but should be, settled by this Court within the meaning of Rule 19. Moreover, a review of the provisions and purpose of the Holding Company Act indicates that the construction of it concurred in below by both the SEC and the Court of Appeals is clearly correct.

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* *Alabama Electric Cooperative, Inc.* v. *Securities and Exchange Commission,* 353 F.2d 905, 907 (D. C. Cir. 1965).

I.

There is no conflict of decision.

Petitioner asserts no conflict of decision between the opinion of the Court of Appeals herein and any opinion of this Court or any court. Indeed, petitioner admits that the issue has not been raised before in the entire thirty-year history of the Holding Company Act. Petitioner does contend, however, that the holdings of both the SEC and the Court of Appeals below fail to adhere to the "plain intent" of a number of decisions of this Court in which such terms as "public interest" and "public convenience and necessity" have been broadly construed in the context of various regulatory statutes (Petition, pp. 9-10).

None of these cases, however, involved construction of the Holding Company Act. Indeed, all of them involve statutes which expressly confer upon some regulatory agency certificating or licensing authority of a kind that the Holding Company Act clearly does not confer upon the SEC. Thus, *Atlantic Refining Co.* v. *Public Service Commission,* 360 U. S. 378, *FPC* v. *Transcontinental Gas Corp.,* 365 U. S. 1 and *United Gas Co.* v. *Callery Properties,* 382 U. S. 223, all involve Section 7(e) of the Natural Gas Act, 15 U.S.C. §717 f(e); *McLean Trucking Co.* v. *United States,* 321 U. S. 67, *Seaboard Air Line R. Co.* v. *United States,* 382 U. S. 154 and *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U. S. 236, all arise under the Interstate Commerce Act and *National Broadcasting Co.* v. *United States,* 319 U. S. 190 and *American Airlines, Inc.* v. *North American Airlines, Inc.,* 351 U. S. 79 involve the Communications Act and the Civil Aeronautics Act, respectively.

Under all of these statutes the appropriate regulatory body has been given the duty to determine which of two or more competing services can best and most efficiently serve the public interest in the relevant area of transportation, broadcasting, et cetera. It is in this context that such agencies have been told to investigate fully all factors bearing on the public interest in reaching their determinations.

The Holding Company Act, however, does not confer upon the SEC the task of deciding which of two or more competing electric utility companies should serve a particular customer in a particular area. It creates no certificating or licensing authority in such matters at all. So the fact that the Natural Gas Act requires the FPC to consider the "end use" of gas in determining whether or not the public interest will be served by a proposed pipeline can hardly mean that the SEC must consider the "end use" of each dollar spent by the subsidiary of a regulated holding company merely because the term "public interest" appears in both statutes.

Although the question presented by the petition herein has not been raised heretofore, the identical issue involving substantially the same parties is currently awaiting argument before the Court of Appeals of the Fifth Circuit.* It is submitted that the present application for

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*The proceeding currently before the Fifth Circuit involves a second application to the SEC by Alabama Power for authority to issue and sell certain shares of preferred stock and bonds. The issue and sale of these securities was authorized by the State Commission at the same time and in the same proceeding as the common stock involved in the instant proceeding. The Cooperative again sought to intervene before the SEC on the same grounds and for the same reasons as in the instant proceeding; intervention was denied by the SEC on the basis of its opinion in the present case. Availing itself of the choice of venue afforded by §24(a) of the Holding Company Act, 15 U.S.C. §79x(a), the Cooperative has sought review of this second order in the Court of Appeals for the Fifth Circuit. Oral argument in that Circuit has been scheduled for March 28, 1966.

certiorari would be more appropriately made when and if the Fifth Circuit reaches a result in conflict with that reached by the Court below.

Petitioner anxiously seeks to borrow significance for its application from the fact that the Court has recently granted certiorari in No. 636, *Securities and Exchange Commission* v. *New England Electric System,* 346 F. 2d 399 (1st Cir. 1965), *cert. granted,* 382 U. S. 963. Petitioner suggests that since the Court will be engaged in that case in an extensive review of the legislative history of the Holding Company Act, review of the present proceeding also might be timely and appropriate (Petition, pp. 12, 15). It should however be sufficient to observe that the question presented in the *New England* case involves the construction of Section 11(b)(1) of the Holding Company Act, which defines the circumstances under which non-integrated holding company systems will be permitted to exist. An examination of this problem can scarcely be probative of the entirely different issued raised under altogether different sections of the Holding Company Act by the present petition, and petitioner's contention amounts merely to the assertion that since the Court has already scheduled one case involving the Holding Company Act it might be appropriate to accept another. We do not understand that the Court's grant of certiorari is to be invoked so lightly.

II.

There is no important question of federal law.

As petitioner concedes at page 12 of its Petition, it is not every misreading of legislative history which this Court feels impelled to correct. Of course, we do not concede that there has been any misreading at all in this

case. But even passing this, petitioner suggests no reasons why the narrow question raised by it is of sufficient importance to warrant review.

Nor can we supply any. Since the issue has not been raised before in the entire thirty years that the Holding Company Act has been in force, it is evident that similar cases involving other litigants are not now pending in other courts awaiting the outcome of the present review. Nor is this a case where the construction placed on a statute by the Court below renders it unclear or difficult to administer, or where the Court below has reached a result at variance with that of the appropriate administrative agency.

Indeed, nothing more clearly demonstrates the narrow and largely academic nature of the issue presented than a consideration of some of its practical consequences. Even should this Court grant certiorari and, after argument, reverse the court below on the merits, upon remand the SEC would presumably be instructed only to exercise its discretionary power to determine whether or not to permit intervention by petitioner. In the event that such intervention was denied, such a denial would presumably not be reviewable except upon a clear showing of abuse.

Even should the SEC permit intervention, however, and after a hearing grant the relief requested by petitioner, it should be emphasized that such relief would necessarily be partial and incomplete. Petitioner does not even suggest that the SEC has the power to prevent Alabama Power from using its funds to provide services competitive with those of petitioner, but only that it can prevent Alabama Power from using a portion of the proceeds of the current financing to do so. It seems clear

without more that the jurisdiction of this Court should not be invoked in order to implement any such fragmentary regulation.

III.

The Decision below is clearly correct.

In addition to the fact that the decisions below are not in conflict with those of any other court and the fact that the issue involved is narrow and largely academic, it is submitted that both the SEC and the Court of Appeals were clearly correct in refusing to accept the strained reading of the statute urged by petitioner. Briefly stated, petitioner's argument is that the interpretation of terms such as "public interest" and "interest of investors or consumers" in the Holding Company Act should be equated with the construction given similar terms in such licensing or certification statutes as the Natural Gas Act or the Interstate Commerce Act. Both the SEC and the Court of Appeals found this equation to be the root fallacy of petitioner's argument. As the SEC noted in its findings, "words like 'public interest' and the interest of 'investors or consumers', though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act" (J.A. 116).

Yet both the provisions and the purposes of the Act, as revealed by its legislative history, amply demonstrate that it was not the intention of Congress to involve the SEC in such endless problems of local utility regulation as which supplier can best serve a specific customer or whether such customer should be given a choice of competing services. Indeed, the whole thrust of the Holding

Company Act was to free local regulatory agencies from the burden of the large interstate holding companies over which they had no control and which thwarted effective local regulation. In so doing, Congress did not establish the SEC as the guarantor of the effectiveness of such local regulation. Nor did Congress provide for appeal to the SEC by a utility disappointed, as petitioner is here, by the refusal of the local regulatory agency to insulate it from competition by another utility.

The soundness of these conclusions is demonstrated not only by the careful examination by the SEC and the Court of Appeals of the Act and its legislative antecedents but also by the basic impracticality of petitioner's arguments. Thus, petitioner makes much of its contention that the goal of effective electric utility regulation throughout the country will remain unrealized until the SEC undertakes to fulfill what petitioner considers its mandate under the Holding Company Act (Petition, pp. 12-13). Petitioner does not suggest, however, how the SEC could possibly fulfill such a role when the Act admittedly gives it jurisdiction only over those relatively few operating utilities which happen to be subsidiaries of registered holding companies. Indeed, as petitioner well knows, the regulatory role it is urging upon the SEC could never be applied to it with the same force as to its competitor Alabama Power. To suggest that such haphazard and unequal regulation could be effective at all is clearly specious.

Putting aside even the obvious impracticality of attempting to regulate competition by regulating only a few of the competitors, petitioner nowhere suggests how the SEC is to equip itself for its monumental new role. If the SEC is really to oversee the effectiveness of local utility regulation in fifty states it will clearly have to acquire a vast

expertise not hitherto required of it. In addition, it will obviously have to find somewhere adequate statutory standards and criteria other than "public interest" or "the interest of investors or consumers" in order to measure the effectiveness of local regulation. Petitioner does not even advert to these problems, much less suggest how they might be resolved.

The conclusion is irresistible that petitioner's only concern is that it be insulated insofar as possible from the effects of local competition in the business of supplying electric service, and that having lost its struggle to obtain such insulation before the local regulatory commission properly having jurisdiction over such matters, it is now attempting on the basis of a strained construction of a wholly inappropriate federal statute to have a second day in court. It is perhaps sufficient to note that this Court has consistently refused to infer a congressional mandate to exclude local competition where none is clearly expressed. *Alabama Power Company* v. *Ickes,* 302 U. S. 464; *Tennessee Electric Power Co.* v. *TVA,* 306 U. S. 118.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY

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PETITIONER'S REPLY

Two points offered by the Government may warrant a short reply.

I

In seeking to justify such a narrow interpretation of SEC's powers under the Holding Company Act, the Government (Br. Opp. p. 10) claims "it is significant" that "the Congress did not choose an agency such as the Federal Power Commission, expressly created to regu-

late utility operating functions, but chose instead the Securities and Exchange Commission, whose specialized experience was largely in the financial field." The inference which the Government would draw is totally erroneous, particularly in view of the specific action actually taken by Congress in the very statutory enactment, the Act of August 26, 1935, of which the Holding Company Act is a part.

The Act of August 26, 1935, 74th Cong., 1st Sess., chapter 687 (49 Stat. 803-863) contains two titles. Title I is the Holding Company Act (49 Stat. 817-838). Title II is a series of amendments affecting the jurisdiction and powers of the Federal Power Commission (49 Stat. 838-863).

In Title II, there was added a new Section 204 of the Federal Power Act (49 Stat. 850-851), codified as 16 U.S.C. § 824c. Subsection (a) of this Section confers jurisdiction on FPC over the issuance of securities by public utilities, and the jurisdiction is measured by a general "public interest" test.[1] Thus Subsection (a) provides that FPC shall authorize such security issues only upon finding that they are for some lawful object "compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility" and "is reasonably necessary or appropriate for such purposes". Subsection (b) authorizes FPC to grant authorizations for such security issues "upon such terms and conditions as it may find necessary or appropriate".

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[1] Recently, however, FPC put certain limitations on the factors which it will consider, at least in a case where no party or intervenor has sought to raise an issue. *Pacific Power & Light Company*, 27 FPC 623 (1962).

Subsection (f) of this Section, however, then proceeds to carve out a most extensive exemption. It specifies that "The provisions of this section [Section 204] shall not extend to a public utility organized and operating in a State under the laws of which its security issues are regulated by a State commission." Thus the scheme of Section 204 is to confer on FPC a general authority over security issues, in terms of "public interest" considerations and the right to attach conditions, but then to give a total exemption to those public utilities organized and operating in a State having a State commission which regulates such security issues.

But the same Title II of the Act of August 26, 1935, also added a new Section 318 of the Federal Power Act (49 Stat. 863), codified as 16 U.S.C. § 825q. This Section eliminated the possibility of double or conflicting jurisdiction as between FPC and SEC. It made SEC's jurisdiction paramount by providing that a public utility shall not be subject to FPC jurisdiction on a matter with respect to which it is subject to SEC jurisdiction under the Holding Company Act.

The combined effect of Titles I and II of this single enactment of August 26, 1935, is therefore plain. Congress decided that the complexities of the problems of regulating holding company systems made it desirable that the securities issues of registered holding companies and their subsidiaries should be regulated by SEC, and that no duplicating federal regulatory jurisdiction should be conferred on FPC. Congress likewise decided that it was not safe or appropriate to insert into the Holding Company Act, which deals with registered holding companies and their subsid-

iaries, a total exemption for certain public utilities equivalent to the exemption afforded by Section 204(f) of the Federal Power Act.

Thus Congress elected in the Holding Company Act not to follow the Federal Power Act pattern and not to make the State commission's regulatory authority a total bar to SEC's jurisdiction. Congress elected to give SEC a full measure of authority with respect to "public interest" and the imposition of appropriate conditions. Contrary to the Government's suggestion, the fact that the responsibility was lodged in SEC rather than in FPC clearly shows a broader grant of authority than if Congress had done it the other way around.

II

The Government also suggests (Br. Opp., p. 10) that significance be attached to the fact that in some thirty years SEC "has not found it necessary to assert" the kind of jurisdiction petitioner would have SEC exercise in this case.

Even an administrative agency's persistent and express refusal to assert a jurisdiction conferred on it by Congress will not diminish either its authority or its duty to carry out the law in the manner in which Congress intended. See, e.g., *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. Here, moreover, there does not exist any long-established administrative construction to bolster the Government's narrow view of the Holding Company Act's scope and meaning. The simple fact is that, until this case arose, SEC never seems to have considered the question one way or the other.

Sometimes a question may not arise for many years because it involves a situation which is uncommon. See, *e.g., Western Pacific R. Co.* v. *United States,* 382 U.S. 237, 244. In other instances, it may be merely because the question has not been expressly raised or faced up to. But whatever the reason may have been here, now that the present question has arisen in this group of cases involving matters of large magnitude and significance, it is clearly of importance to the Holding Company Act's proper administration that SEC should not, by fundamental misinterpretation of the Act, abdicate such a substantial measure of its responsibility.

As stated in the Petition for Certiorari (p. 9, note 4), a comparable question is to be argued in the Fifth Circuit on March 28, 1966, on review of the SEC's July 29, 1965 order with respect to a subsequent Alabama Power Company application involving some $45,000,000 of financing. In addition, this petitioner has recently filed in the Fifth Circuit a petition to review the SEC's comparable February 28, 1966 order, involving $5,000,000 of the funds for Alabama Power Company's 1966 construction program. And it appears that at least one more SEC proceeding will be required to obtain approval of about $42,000,000 of financing for the remainder of Alabama Power Company's 1966 construction program.

It is, of course, correct to say, as does the companies' Brief in Opposition (pp. 7-8), that a direct conflict of decisions would be produced "when and if the Fifth Circuit reaches a result in conflict with that reached by the Court below". But for the reasons we have given, we submit that the matter is ripe for a definitive re-

view by this Court now, without requiring that we await the outcome of the cases in the Fifth Circuit.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Certiorari, certiorari should be granted.

Respectfully submitted,

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